STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 284649 Wayne Circuit Court
WINSTON ROBERT BRIGGS, Defendant-Appellant.	LC No. 07-020910-FC

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant as an habitual offender, second offense, MCL 769.10 to serve concurrent prison terms of 30 to 60 years for second-degree murder, and two to seven years for felon in possession, in addition to a consecutive two-year term for felony-firearm.

I. FACTS

On September 27, 2007, Tira Manuel's body was found in her minivan in a vacant field in Detroit. The victim's bare feet were muddy, with blades of grass between her toes, indicating that she had been dragged through a grassy area. Ms. Manuel died of a gunshot wound to the right side of her chest and the trajectory of the bullet revealed that the shooter had been standing to her right. Forensic examination of Ms. Manuel's clothing and body also showed that she had been shot from a distance of no more than three feet. The medical examiner, Dr. Carl Schmidt, determined that Ms. Manuel lost consciousness 20 to 30 seconds after being shot, and died two to three minutes later.

Ms. Manuel's cell phone records show that she called her friend and defendant's brother, John Briggs, between 3:00 and 4:00 a.m. the morning of September 27, 2007. Defendant and John Briggs lived in a two-family flat on French Road, four or five blocks from the location where Ms. Manuel's body was found. Ms. Manuel possessed a key to John's flat, and she sometimes used it to let herself in.

Police officers went to the French Road flat to contact John Briggs, who may have been the last person to talk to Ms. Manuel before her death. Several people were at the house when

the police arrived. The officers conducted a protective sweep of the premises, and found a handgun. They secured the area while an officer obtained a search warrant. Police found blood stains in the porch area of the French Road flat, but the samples were too small or too degraded for DNA analysis.

Defendant was one of the people present when the officers executed the warrant and searched the French Road flat. In the course of the search, Officer Gary Diaz asked defendant where he had been the night Ms. Manuel was murdered. Officer Diaz testified that defendant "just welled up" and "started tearing up" at this question.[1] Officer Diaz took defendant to his police cruiser and advised him of his *Miranda* rights. Defendant told Officer Diaz that he "didn't mean to do it, it was an accident." Officer Diaz placed defendant under arrest and conveyed him to the southwest district homicide section. While in the police car, defendant revealed to Officer Diaz the location of the weapon. Defendant led the officers to a basement in a burnt-out house and showed them where the gun had been abandoned. A ballistics examiner determined from a comparison test that the bullet that killed Ms. Manuel had been fired from this firearm.

Defendant gave another statement to the police after he was taken to the homicide section, but this statement was not admitted into evidence at trial.

At trial, defense counsel stated in his opening argument that defendant believed that he was acting in self-defense when he shot Ms. Manuel. Counsel stated that defendant and his girlfriend were asleep in the lower flat of the French Road house the night of Ms. Manuel's death. Defense counsel described the flat as not being "the best kind of house," where there were "some activities that may be kind of questionable." Defendant was apprehensive because a "couple of people" had come to the house late at night, and he was concerned that they would return. When Ms. Manuel banged on the door and entered the house with her key at 3:00 a.m., defendant believed that she was an intruder and shot her. Defendant tried to take her to a hospital, but she died before he could get help.

And, though defense counsel made this argument during opening statements, at trial defendant failed to produce any evidence in support of this theory. Defense counsel advised the trial court that defendant's girlfriend, Rachel Patton, was not served a subpoena, but he expected her to appear. He stated that she had come to the court the second day of trial, but she was not present the third day, when she should have testified. He was surprised by her failure to appear. Defense counsel did not call John Briggs. Defense counsel discussed with defendant the implications of testifying or not testifying, and defendant decided not to testify. In closing argument, defense counsel argued that there was reasonable doubt as to whether the shooting was intentional, and emphasized that defendant told Officer Diaz that the shooting was accidental.

II. SUFFICIENCY OF THE EVIDENCE

[1] We use normal sentence case in quoting from the trial transcript, although the transcript is typed entirely in uppercase letters.

Defendant argues that the evidence was insufficient to prove his guilt of second-degree murder. In challenges to the sufficiency of the evidence, we review the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). "Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

To convict a defendant of second-degree murder, the prosecution must establish these elements: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The degree of malice necessary to support a conviction of second-degree murder is defined as the intent to kill, the intent to cause great bodily harm, or the intent to commit an act in wanton and willful disregard that act has a natural tendency to cause death or great bodily harm. *Roper*, 286 Mich App at 84.

Defendant argues that there was insufficient evidence of his state of mind to prove that he acted with malice.[2] We disagree. A trier of fact could infer from defendant's tacit admission and from his knowledge of the gun's location that he shot Ms. Manuel. Ms. Manuel was shot from a short distance, suggesting that defendant shot her deliberately, and that he could see who he was shooting. The trier of fact could also infer from circumstantial evidence that defendant dragged Ms. Manuel's body through a grassy area in order to conceal it in her minivan instead of notifying the police, facts that are more consistent with a malicious than an innocent explanation.

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). Despite defendant's opening argument, he never presented any evidence that he shot Ms. Manuel in self-defense. Accordingly, the prosecutor was not obligated to disprove any self-defense theory, and the evidence was sufficient to support defendant's conviction.

III. VOIR DIRE

The first day of trial, before the jury entered the courtroom, the trial court discussed a plea offer with the parties. The trial court commented that trial was ready to begin, and the jury pool was waiting. However, it allowed defendant time to discuss the plea offer with his counsel. Defendant conferred with his counsel for fifteen minutes, and then informed the trial court that he had declined the offer.

[2] Defendant also argues that there was insufficient evidence to prove that he shot Manuel. He argues that his statement that "it was an accident" and that he "didn't mean to do it" could refer to another individual's action. However, defendant conceded at trial, through counsel, that he was the shooter.

The trial court conducted voir dire itself, without participation by counsel. Defense counsel exercised nine peremptory challenges and no challenges for cause. The trial court asked the jurors whether they knew defendant, the attorneys, or any of the named witnesses. The court also questioned the jurors regarding physical conditions that could interfere with jury service, prior experiences with the criminal justice system, and biases for or against law enforcement personnel.

Defendant argues that the trial court's voir dire method was too limited to allow him a fair opportunity of discovering bias or other factors warranting challenges for cause or peremptory challenges. Specifically, he asserts that the trial court did not inquire whether the jurors were biased against defendant, whether they understood that defendant had no obligation to testify, or whether they held any strong opinions regarding firearm ownership. Defendant did not raise any objections to the trial court's voir dire.[3] Accordingly, we review this unpreserved issue for plain error affecting defendant's substantial rights. Because the alleged error is unpreserved, it is subject to review for plain error under *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). Accordingly, defendant is entitled to relief only if he can show (1) that error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected his substantial rights, which generally requires a showing that the error affected the outcome of the trial court proceedings. *Id.* at 763.

"The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. In voir dire, meaning 'to speak the truth,' potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (internal citations omitted). Trial courts are granted wide discretion in determining the manner of achieving the goal of an impartial jury through voir dire. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996), quoting *Tyburski*, 445 Mich at 623. A defendant does not have the right to have counsel conduct voir dire or to any other specific procedure for voir dire. *Tyburski,* 445 Mich at 619; *Sawyer,* 215 Mich App at 191. "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Tyburski*, 445 Mich at 619. A defendant is entitled to relief from a verdict because of limitation of voir dire only if it is shown that a juror was properly excusable for cause or the defendant was actually prejudiced by the presence of the juror in question. *People v Washington*, 468 Mich 667, 675; 664 NW2d 203 (2003).

We find no plain error affecting defendant's substantial rights. The trial court's voir dire questions covered the principal areas of bias and ability to fairly render a decision based on the evidence. In the course of voir dire, the trial court instructed the jurors that defendant was not obligated to testify, call witnesses, cross-examine prosecution witnesses, or otherwise present a

[3] The final pretrial conference summary states that all questions pertaining to voir dire must be filed one week prior to trial. There is no indication on the record or in defendant's brief that he submitted any questions for jury voir dire.

defense. Under these circumstances, there is no basis for inferring that defendant was prejudiced by the court's method of conducting voir dire.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied the effective assistance of counsel. In order to establish ineffective assistance, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Where, as here, there has been no evidentiary hearing on the issue below (defendant's motion to remand was denied by this Court), our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

Defendant argues that his counsel erred in failing to present evidence in support of his self-defense or accident theories. He argues that his brother, John Briggs, and his girlfriend, Rachel Patton, could have testified that defendant shot Ms. Manuel because he reasonably believed that she was an intruder. He also argues that he could have testified on his own behalf. He asserts that defense counsel's attempt to raise an accidental shooting defense based solely on defendant's statement to Officer Diaz invited the prosecutor to belittle this theory in closing argument. However, there is no record support that Ms. Patton or John Briggs would have testified in support of a viable self-defense or accident theory. Accordingly, we cannot assess whether defense counsel erred in not calling these witnesses, or whether their testimony might have affected the outcome of the trial.

Assuming, arguendo, that defendant's own testimony would have established the theory that his counsel raised in opening argument, defendant cannot rebut the presumption that defense counsel exercised sound strategy in not calling him. The evidence against defendant was far from overwhelming: the prosecution offered no evidence regarding the circumstances of the shooting or the placement of Ms. Manuel's body in her minivan, and there was no evidence of a motive. Defense counsel could have reasonably determined that the jury was more likely to acquit defendant based on reasonable doubt than on the basis of self-serving testimony. Moreover, the record reflects that defendant decided not to testify after conferring with defense counsel regarding the potential advantages and disadvantages. This indicates that defendant's failure to testify was a strategic decision made with both individuals' input. Under these circumstances, we find no ineffective assistance of counsel.

V. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by asserting facts not raised in evidence and by suggesting that she had personal knowledge of facts. This claim is based on these statements the prosecutor made in her closing argument:

> We don't have – I don't know for certain what he did. But I know for certain he didn't call the police. I know for certain he didn't get her medical help. I know

> for certain the body was abandoned and discarded. Those are action [sic] afterwards. Concentrate on those.

Defendant did not object to this statement. We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

A prosecutor may not make factual statements that are not supported by the evidence, but she is free to draw reasonable inferences from the facts of the case. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). There is no testimony directly explaining how Ms. Manuel's body was found. Officer Angela Byars testified that she "was dispatched" on September 27, 2007 to the vacant lot where Ms. Manuel was found in her minivan, but she did not give the time, only that it happened during the day shift. There was no testimony explaining how Byars came to be dispatched to that scene. Officer Byars gave no indication that she needed artificial light to see the minivan and Ms. Manuel's body, which implies that she arrived at the scene during daylight hours. From this testimony, the prosecutor could infer that the police were not notified until several hours after the shooting that a minivan containing a dead body was parked in a vacant lot, and that there was no suspicion concerning the person or persons who made the report. These inferences supported the prosecutor's argument that defendant did not notify the police.[4] Notwithstanding the hypothetical possibility that defendant anonymously notified the police of the location of Ms. Manuel's body, the evidence supported the prosecutor's statement that the body was "abandoned and discarded," and that defendant made no attempt to seek medical help, or at least medical verification that Ms. Manuel was dead. In view of this evidence, the prosecutor's statement did not constitute plain error affecting defendant's substantial rights.

VI. NEWLY DISCOVERED EVIDENCE

Defendant asserts that retesting of the murder weapon showed that the gun did not require as many pounds of pressure to pull the trigger than the prosecution asserted at trial. Specifically, defendant maintains that, at trial, the prosecutor presented evidence that the trigger required nine to 10 pounds of pressure, but later testing showed that the gun required only 6.8 pounds of pressure. According to defendant, the jury may have convicted him of manslaughter instead of second-degree murder if this evidence was presented because the lighter trigger pull suggests that the killing may have been an accident. After an evidentiary hearing on remand, the trial court ruled that the new evidence did not warrant a new trial.

"A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range

[4] Hypothetically, defendant might have made an anonymous call to the police reporting the presence of a dead body in a vehicle, but it is just as reasonable, if not more reasonable, to infer that the police received information from someone not connected to the shooting.

of outcomes." *Id*. As this Court explained in *People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005):

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

We hold that the trial court correctly ruled that the new evidence of a lighter trigger pull would not have made a different result probable on retrial. On remand, the firearms examiner testified that it is not unusual to have different results when measuring the pressure of a trigger pull. Further, while a lighter trigger pull would have caused the gun to fire more easily, the trial court correctly noted that, with 6.8 pounds of pressure, defendant nonetheless would have had to apply pressure to the trigger in order to fire the weapon. As the court observed, the lighter pull does not suggest the gun had a "hair trigger" that would make the gun much more likely to discharge accidentally. And, as the trial court also correctly ruled, the gun had to be cocked before it would fire. Because two actions were required to fire the weapon—cocking the gun and pulling the trigger—it is also unlikely that evidence of a lighter trigger pull would have caused the jury to conclude that defendant shot the gun accidentally. Defendant has not shown that the trial court abused its discretion when it denied his motion for a new trial.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto